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Supreme Court, U.S.
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No. 00-1789

In The

Supreme Court of the United States

PENSION BENEFIT GUARANTY CORPORATION,

Petitioner,

v.

KATHRYN A. BELFANCE, TRUSTEE, the Copperweld Steel Company Liquidation Trust,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH F. HUTCHINSON, JR.*
CLAIR E. DICKINSON
BROUSE MCDOWELL
Attorneys for Respondent
500 First National Tower
Akron, OH 44308
(330) 535-5711

**Counsel of Record*

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QUESTION PRESENTED

Whether bankruptcy claims of the Pension Benefit Guaranty Corporation ("PBGC") for unfunded future benefit liabilities are properly calculated by using a discount rate that establishes the true economic value of the claims "as of the date of the filing of the petition" as required by 11 U.S.C.A. § 502(b).

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Kathryn A. Belfance, Trustee of the Copperweld Steel Company Liquidation Trust, submits this brief in opposition to the petition for a writ of certiorari filed by the Pension Benefit Guaranty Corporation ("PBGC").

STATEMENT OF THE CASE

It is a fundamental principle of bankruptcy law that similarly situated creditors are to be treated equally. Each creditor in a particular class is to receive a pro rata share of that part of the debtor's estate available for distribution to all the members of that class. The PBGC, however, argued to the courts below that this fundamental principle should not apply to its claims for unfunded benefit liabilities. It argued for application of a discount rate to its unfunded benefit liabilities claims that would have resulted in those claims being allowed at 27 times their true value to the detriment of every other creditor in its class. The courts below rejected the PBGC's attempt to secure a disproportionately large share of the debtors' estates. The PBGC has now sought review in this Court.

1. The Parties

Copperweld Steel Company was a Warren, Ohio, manufacturer and supplier of specialty steel products. On November 23, 1993, it and its corporate parent, CSC

Industries Inc., filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C.A. §§ 1101-1174 (1993). The two cases were consolidated pursuant to a plan of reorganization that was adopted by the bankruptcy court. Under the plan, respondent Kathryn A. Belfance was appointed Trustee of the Copperweld Steel Company Liquidation Trust.

The PBGC is a corporation, wholly owned by the United States, that administers an insurance program for defined benefit pension plans. 29 U.S.C.A. § 1302 (1999). In return for premiums paid it, the PBGC guarantees that, if a defined benefit pension plan is terminated, the beneficiaries of that plan will receive, within statutory limits, their pension benefits. 29 U.S.C.A. § 1322 (1999). When the assets in a terminated plan are not sufficient to make the guaranteed payments to plan beneficiaries as those payments become due, the PBGC, in effect, "makes up" the deficiency. The PBGC, in turn, has a claim against the plan sponsor for that deficiency ("the unfunded benefit liabilities"). 29 U.S.C.A. § 1362(b)(1)(A) (1999).

Copperweld sponsored three separate defined benefit pension plans for different segments of its workforce. Those plans were terminated on September 30, 1995. The PBGC filed proofs of claim with the bankruptcy court for unfunded benefit liabilities of each of the three plans. Ms. Belfance objected to the amounts of those claims.

2. Defined Benefit Pension Plans and Unfunded Benefit Liabilities

A defined benefit pension plan provides that an employee, upon retirement, will receive a specific amount

as an annual pension benefit. That amount is calculated using a formula that incorporates factors such as the employee's years of service and his or her final salary. *See Pension Benefit Guaranty Corporation v. LTV Corporation*, 496 U.S. 633, 637 n. 1 (1990).

Prior to adoption of the Employee Retirement Income Security Act of 1974 (ERISA), employers who provided defined benefit pension plans for their employees typically paid benefits due under those plans with funds earned by the employer during the year in which those benefits were paid. Wolfe, *Is Your Pension Safe? A Call For Reform Of The Pension Benefit Guaranty Corporation And Protection Of Pension Benefits*, 24 Sw. U. L. Rev. 145, 162 (1994). ERISA, however, established a requirement that defined benefit pension plans be "pre-funded." Pursuant to ERISA, if an employer maintains a defined benefit pension plan, it must annually pay into that pension plan a contribution that consists of two parts – "normal costs" and "past service obligations." 29 U.S.C.A. § 1082 (1999).

The "normal costs" part of an employer's annual payment is an amount calculated to provide that portion of the retirement benefits to which its employees will in the future be entitled as a result of their employment during the current year. 29 U.S.C.A. § 1002(28) (1999). The "normal costs" for any given year are calculated by actuaries based upon a number of assumptions dealing with, among other things, expected retirement ages, life expectancy, and the return that can be expected from investing the money paid into the plan. *See* Wolfe, *Is Your Pension Safe? A Call For Reform Of The Pension Benefit Guaranty Corporation And Protection Of Pension Benefits*, 24 Sw. U. L. Rev. 145, 164 (1994).

The "past service obligations" part of an employer's annual payment is based upon its employees' work during prior years. "Past service obligations" can arise for a number of reasons. Two are illustrative.

First, as mentioned previously, prior to adoption of ERISA, employers did not typically pre-fund defined benefit pension plans. Upon adoption of ERISA, therefore, employers with preexisting plans owed those plans money based upon years that their participating employees had already worked and for which the employers had not paid the "normal costs." Pursuant to ERISA, those employers were afforded 40 years within which to amortize the amounts owed for years prior to adoption of ERISA. 29 U.S.C.A. § 1082(b)(2)(B)(i) (1999). Similarly, upon establishment of a new plan, there is an immediate deficit because of prior years worked by individuals now covered by the plan. Employers who have established defined benefit pension plans since adoption of ERISA are afforded 30 years within which to amortize the amounts owed for years worked by plan participants before adoption of the plan. 29 U.S.C.A. § 1082(b)(2)(B)(ii) (1999). Employers with "past service obligations" based on pre-ERISA or pre-plan employment must make payments on those obligations each year. 29 U.S.C.A. § 1082(b)(2) (1999).

Second, because of the nature of a defined benefit pension plan, it is necessary each year to reexamine the amounts paid during previous years to determine whether, based upon newly available information, those amounts will be sufficient to generate the benefits to which employees will be entitled based upon their employment during those prior years. Perhaps the plan's

return on investment has proven to be less than expected. Or, perhaps, changes in the life expectancy tables have increased the period during which it can be anticipated the retirees will collect benefits. Sometimes, negotiations between an employer and its employees result in an increase in the amount of benefits to which retirees will be entitled. When any of these, or similar events occur, reexamination by the actuaries results in a conclusion that, although it was believed in prior years that the "normal costs" paid in those years were sufficient to generate the benefits to which employees will be entitled upon retirement based upon their work during those years, the information now available shows that additional payments into the plan will be required to do so. Under ERISA, employers are permitted to amortize additional amounts necessary to supplement "normal costs" paid in prior years over a number of years. 29 U.S.C.A. § 1082(b)(2)(B)(iii)-(v) (1999).

Because ERISA allows employers to amortize "past service obligations" over a number of years, many defined benefit pension plans for which employers have made all their required annual payments as they became due would be underfunded if they were terminated. *See* Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 Minn. L. Rev. 803, 812 (1993). ERISA requires sponsors of most defined benefit pension plans to participate in the termination insurance program administered by the PBGC to guarantee that, if a covered plan is terminated, participants and beneficiaries will receive, within statutory limits, the benefits they have been promised. 29 U.S.C.A. § 1321 (1999).

Under ERISA, covered plans may be terminated voluntarily or involuntarily. There are two types of voluntary terminations.

The first type of voluntary plan termination is a "standard" voluntary termination. A standard voluntary termination does not implicate the PBGC's insurance function because a pension plan can only be terminated pursuant to a standard voluntary termination if it is "fully funded." To complete a standard voluntary termination, the sponsor must purchase close-out annuities that will pay all benefits to which plan beneficiaries will become entitled. 29 U.S.C.A. § 1341(b) (1999); Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 Minn. L. Rev. 803, 808 (1993).

The second type of voluntary plan termination is a "distress" termination. In order to terminate a pension plan in this manner, the employer must demonstrate that it is in financial "distress." Among the situations in which a distress termination is possible is when the employer is in a reorganization proceeding and the bankruptcy court determines that, in the absence of a termination, the employer will not survive outside bankruptcy. 29 U.S.C.A. § 1341(c) (1999); Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 Minn. L. Rev. 803, 808 (1993).

The PBGC can seek involuntary termination of a plan if the employer fails to pay the PBGC premium payments due it or fails to make its required annual contributions to the plan. It also can seek involuntary termination if the plan is unable to pay benefits when due or if continuation of the plan will result in long-term loss for the PBGC. In

order to complete an involuntary plan termination, the PBGC either must reach an agreement with the employer or obtain federal court approval. 29 U.S.C.A. § 1342(a) (1999); Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 Minn. L. Rev. 803, 808 (1993).

3. This Case

As mentioned previously, Copperweld sponsored three separate defined benefit pension plans for different segments of its workforce. The PBGC filed an action in the United States District Court for the Northern District of Ohio against Copperweld and CSC, seeking an order involuntarily terminating those plans. Eventually, that action was settled and dismissed based upon an agreement among the PBGC, Copperweld, and CSC that the plans would be terminated on September 30, 1995, and the PBGC would become trustee of the terminated plans. Upon termination, assets in the three plans worth $126,731,224 were transferred to the PBGC.

In addition to receiving the assets of the three terminated plans, the PBGC filed proofs of claim in Copperweld's and CSC's bankruptcy proceedings for amounts it asserted represented the unfunded benefit liabilities of the three terminated plans. According to the PBGC, the total of those unfunded benefit liabilities, as of the date the plans were terminated, was $49,658,703. Ms. Belfance objected to the amount of the PBGC's unfunded benefit liabilities claims.

The PBGC calculated its claims via a three-step process. First, its actuaries calculated the guaranteed benefits

to which plan beneficiaries would be entitled. They did that through the use of assumptions regarding such things as expected retirement ages and life expectancy. Second, the PBGC purported to reduce those guaranteed benefits to their present value as of the plan termination date by applying interest factors (referred to at times as "discount rates"). Pursuant to the assumptions used by the PBGC to complete this step, it concluded that the present value of the guaranteed benefits as of the plan termination date was $176,389,927. Finally, it compared that amount to the value of the plan assets that had been delivered to it upon termination, $126,731,224, and concluded that the plans had unfunded benefit liabilities totaling $49,658,703.

As mentioned previously, Ms. Belfance objected to the amount of the PBGC's unfunded benefit liabilities claims. Specifically, she challenged the second step of the process used by the PBGC. Instead of using interest factors aimed at calculating the true present value of the future guaranteed benefits, the PBGC used artificially low interest factors of 6.4% for the first 20 years and 5.75% thereafter. The PBGC has stipulated that it chose those rates, not for the purpose of accurately calculating the amount it would need to invest as of the plan termination date to generate the benefits to which plan participants will become entitled, but rather in order to duplicate the amount "a plan sponsor would have paid a private insurer for a close-out annuity that covers the same benefits."

Ms. Belfance argued that the discount rates used by the PBGC were unreasonably low, resulting in wildly overstated claims. Among other things, she pointed out

that the PBGC does not purchase close-out annuities. Rather, it invests assets it receives from terminated plans in a Trust Fund Account, which, according to the PBGC's 1995 Annual Report, had earned a return on investment of 16.6% during the five years ending September 30, 1995. 1995 PBGC Ann. Rep. 24.[1] She further pointed out that, from the inception of ERISA in 1976 through September 30, 1995, the PBGC had earned a combined return on its investment in its Trust Fund Account and its Revolving Account, the account in which it deposits its premium revenues, of 11.3%, which is far in excess of the 6.4% and 5.75% it sought to have applied in this case. Ms. Belfance argued that, to prevent the PBGC from receiving a huge windfall at the expense of other creditors of Copperweld and CSC, a "prudent investor rate" should be used to calculate the PBGC's unfunded benefit liabilities claims.

The PBGC argued that two provisions of Title IV of ERISA, Sections 1362(b)(1)(A) and 1301(a)(18) of Title 29 of the United States Code, required the bankruptcy court to allow its claims as the PBGC had calculated them. Section 1362(b)(1)(A) provides that a sponsor of a terminating pension plan is liable to the PBGC for "the total unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan. . . . " The phrase "amount of unfunded benefit liabilities" is defined, for purposes of Title IV of ERISA, at Section 1301(a)(18) of Title 29. That definition refers to assumptions contained in a regulation adopted by the PBGC:

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[1] For the five-year period ending September 30, 2000, the PBGC's return on its equity investments was 19.9%. 2000 PBGC Ann. Rep. 17.

> (18) "amount of unfunded benefit liabilities" means, as of any date, the excess (if any) of –
>
> (A) the value of the benefit liabilities under the plan (determined as of such date on the basis of assumptions prescribed by the [PBGC] for purposes of section 1344 of this title), over
>
> (B) the current value (as of such date) of the assets of the plan;. . . .

The assumptions referred to in Section 1301(a)(18) are found in a regulation, 29 C.F.R. § 2619, drafted by the PBGC for the purpose of discouraging pension plan terminations. As mentioned previously, ERISA allows a defined benefit pension plan sponsor to voluntarily terminate a plan through a "standard" termination. That procedure is expensive because, in order to complete it, the plan sponsor must purchase, from a private insurer, "close-out" annuities that will pay all benefits to which plan beneficiaries will become entitled. 29 U.S.C.A. § 1341(b) (1999); Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 Minn. L. Rev. 803, 808 (1993). The amount necessary to purchase such annuities is far more than what must be invested at a "reasonably prudent investor" rate to earn the same return. The PBGC stipulated that it drafted 29 C.F.R. § 2619, which is applicable to "distress" and involuntary plan terminations, to duplicate the price a plan sponsor would have to pay a private insurer for a close-out annuity in order to complete a standard voluntary plan termination. That is, the PBGC drafted 29 C.F.R. § 2619 as it did to make sure that distress and involuntary plan terminations would not be more attractive to plan sponsors than are standard terminations. The PBGC did not want employers who wished

to terminate their defined benefit pension plans to be able to get a "better deal" by not making their premium payments and minimum funding contributions, thereby causing the PBGC to seek an involuntary termination, than they can get through a standard voluntary termination. In short, the PBGC's regulation is meant to discourage plan terminations by employers.

Pursuant to the Plan of Reorganization adopted by the bankruptcy court in this case, the PBGC's unfunded benefit liabilities claims were classified as Class 5B general unsecured claims. A cash reserve was created within the estate to cover the maximum pro rata amount the PBGC could receive on its unfunded benefit liabilities claims. To the extent the cash reserve is not distributed to the PBGC, it will be distributed to the other Class 5B general unsecured creditors. None of that reserve will go to the debtors or any decision-makers of the debtors.

In an opinion issued on December 3, 1997, the bankruptcy court rejected the PBGC's argument and determined that a "prudent investor rate" should be used to calculate the value of its unfunded benefit liabilities claims as of the plan termination date. Pet. App. 7a. The parties thereafter stipulated that "[t]en percent, net of all administrative expenses, is a rate of return on pension funds that could be expected by a 'reasonably prudent investor' of pension funds." The value of PBGC's unfunded benefit liabilities claims, as of the plan termination date, calculated through application of a reasonably prudent investor rate of 10%, is $1,822,075, approximately $1/27$ of the amount the PBGC sought by its proofs of claim. By its Judgment of December 8, 1998, the bankruptcy court applied the prudent investor rate and allowed the

PBGC general unsecured claims of $1,822,075. Pet. App. 10a-11a.

The PBGC appealed the bankruptcy court's decision to the United States District Court for the Northern District of Ohio. On August 10, 1999, the district court affirmed the decision of the bankruptcy court. Pet. App. 12a-19a. In doing so, it relied heavily on the reasoning of the United States Court of Appeals for the Tenth Circuit in *Pension Benefit Guaranty Corp. v. CF & I Fabricators of Utah, Inc.*, 150 F.3d 1293 (10th Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999), which had rejected the identical argument being made by the PBGC. The district court concluded that, "[a]lthough PBGC's valuation method is valid in other contexts, . . . it is not the appropriate valuation method in Bankruptcy Court." Pet. App. 18a.

The PBGC appealed the decision of the district court to the United States Court of Appeals for the Sixth Circuit. The court of appeals, on November 17, 2000, affirmed. It noted that, in order to deal with Copperweld's debts under a reorganization plan, the bankruptcy court was required to reduce all its liabilities to their present value. Pet. App. 22a. It then considered whether the bankruptcy court had acted properly in using a reasonably prudent investor rate to make that reduction. While acknowledging that the Court of Appeals for the Tenth Circuit, in *CF & I*, had rejected the very argument being made by the PBGC, it did not adopt that court's reasoning in its entirety. Specifically, it noted that the court in *CF & I* had relied, in part, upon a provision found in subchapter I of ERISA that did not appear applicable to the question in front of it:

> We are not entirely persuaded that the district and CF & I courts were correct in concluding that 29 U.S.C. § 1144(d), which provides that "nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States," requires that the ERISA provision, 29 U.S.C. § 1301(a)(18), be subordinated to the Bankruptcy Code. Section 1144(d), on its face, applies only to subchapter I of ERISA, whereas the definition of unfunded benefit liabilities, section 1301(a)(18), is found in subchapter III of ERISA.

Rather, the reasoning of the court of appeals in this case was guided by Sections 502(b) and 1123(a)(4) of the Bankruptcy Code:

> Under 11 U.S.C. § 502(b), the bankruptcy court must, upon objection to a claim, "determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition." Therefore, the bankruptcy court must value present claims and reduce claims for future payment to present value, while also keeping in mind that a fundamental objective of the Bankruptcy Code is to treat similarly situated creditors equally. *See* 11 U.S.C. § 1123(a)(4).

Pet. App. 23a. The court concluded that "the bankruptcy court's authority under 11 U.S.C. §§ 502(b) and 1123(a)(4) to determine the amount of claims in bankruptcy proceedings and treat creditors in the same class equally gives it the authority to value unfunded benefit liabilities claims using a 'prudent investor rate.' " Pet. App. 25a.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT THE PETITION

The issue raised by the PBGC does not warrant granting its petition. It is a narrow question of bankruptcy law, the resolution of which is controlled by two federal statutes, Sections 502(b) and 1123(a)(4) of the Bankruptcy Code, 11 U.S.C.A. §§ 502(b) & 1123(a)(4) (1999). There is no conflict between the decision of the United States Court of Appeals for the Sixth Circuit in this case and decisions of this Court or other courts of appeals. In fact, as noted by the PBGC itself, there is "an unbroken line of appellate and lower court decisions" rejecting the PBGC's position.[2] Pet. 11. The Court of Appeals for the Tenth Circuit, the only other appellate court to consider the PBGC's argument, rejected it in *Pension Benefit Guaranty Corp. v. CF & I Fabricators of Utah, Inc.*, 150 F.3d 1293 (10th Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999), and this Court denied certiorari. The only thing of relevance that has happened in the two years since that denial was the decision of the court of appeals in this case. A decision in which the court, while refusing to follow a questionable aspect of the Tenth Circuit's reasoning, reached the same conclusion.

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[2] The "unbroken line" is not particularly long. In addition to this case, it consists of *PBGC v. CF & I Fabricators*, 150 F.3d 1293 (10th Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999), and *LTV Corp. v. PBGC (In re Chateaugay Corp.)* 130 B.R. 690 (S.D.N.Y. 1991), 126 B.R. 165 (Bankr. S.D.N.Y. 1991) and 115 B.R. 760 (Bankr. S.D.N.Y. 1990), *vacated by consent order*, 17 Employee Benefits Cas. (BNA) 1102 (S.D.N.Y. 1993). Accordingly, it would be premature to grant certiorari in this case.

Much of the PBGC's argument in favor of this Court granting certiorari is, at bottom, simply an argument that, because of its role as guarantor of pension funds, it should be excused from participating in the judicial system on the same footing as other parties. It argues that its petition should be granted because the court of appeals decision "has an immediate and continuing impact" on it. Pet. 11. It is not at all unusual for judicial decisions to have immediate and continuing impact on parties to those decisions. It further argues that it should receive special treatment in bankruptcy, different from the treatment afforded other creditors. *See* Pet. 12-13. To the extent that the PBGC seeks special treatment, however, it has come to the wrong forum. If, indeed, there were legitimate policy considerations for treating the PBGC differently from other parties before the bankruptcy court, Congress, not this Court, would be the proper forum to weigh those considerations. Even if the question presented by the PBGC were proper for this Court to resolve, this petition is premature. The question presented has only been considered by two appellate courts, both of which reached the same conclusion. There is no compelling reason for this Court to become involved in this issue at this time.

The PBGC has argued that this Court should grant certiorari in this case because it may not get another opportunity to review the question presented in the near future. According to the PBGC, because there are two levels of review of a bankruptcy court's decisions, "it is likely to be many years before the issue of PBGC's termination liability claim can be presented to another court of

appeals." Pet. 11. The PBGC's 2000 Annual Report, however, indicates that, "[a]t the end of the year, PBGC had 81 active cases in state and federal courts and 575 bankruptcy cases." 2000 PBGC Ann. Rep. 19. If the question presented in this case is anywhere near as critical as the PBGC would have this Court believe, it must surely be present in a number of those other cases in which the PBGC is a party. If the PBGC ever succeeds in convincing an appellate court to accept its position on this issue, then, perhaps, there would be a reason for this Court to consider granting certiorari. Those cases should proceed through the judicial system just as other cases do. There is no reason to accelerate review of the question presented just because that question is presented by the PBGC. The PBGC's fear that this Court may not have an opportunity to review the question presented for "many years" is baseless conjecture and not a reason to grant certiorari in this case.

Much of the PBGC's petition is focused on dire predictions that the decision of the court of appeals in this case will spell doom for the nation's pension system. According to the PBGC, this case presents a "recurring issue that has plagued PBGC for more than a decade. . . . " Pet. 9. It has asserted that the decision below "has an immediate and continuing impact on [it], particularly in light of the slowdown in the U.S. economy and the recent wave of corporate bankruptcies." Pet. 11. In fact, according to the former executive director of the PBGC, it ended the year 2000 "in its best shape ever." *See* 2000 PBGC Ann. Rep. 3. The single-employer program, the program relevant to this case, had a record net income last year of nearly $2.7 billion, and now has a surplus of

$9.7 billion. *Id.* at 14-15. The history of the single-employer program over the last decade, and particularly over the last five years, could not contrast more starkly with the PBGC's cries of doom.

Prior to 1987, the PBGC was limited in its recovery of unfunded benefit liabilities from a plan sponsor to 30% of that sponsor's net worth. *See* Pet. 12. With the passage of the Pension Protection Act of 1987, Congress removed that limitation.[3] In doing so, Congress intended to strengthen the PBGC's financial condition. It did so. While the PBGC experienced deficits in its single-employer program for the first 20 years of its existence, it began experiencing surpluses in that program in 1996. Those surpluses have grown steadily from $869 million in 1996 to this year's $9.7 billion. *See* PBGC, *Pension Insurance Data Book 1999* 17 (Table S-1) (2000); 2000 PBGC Ann. Rep. 15. That growth took place without the PBGC being successful in convincing a single court to accept its position that it is entitled to favored treatment in bankruptcy. If Congress were to decide that the PBGC's financial condition should be further strengthened by permitting it to recover amounts in bankruptcy far in excess of the actual unfunded benefit liabilities of terminated pension plans, it could pass legislation authorizing such recoveries. It has not, and it would not be appropriate for this Court to allow such recoveries at the expense of other creditors.

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[3] Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 § 9312(b)(2)(A).

Certainly, the PBGC's desire to further increase its surplus is understandable, but accomplishment of that desire through having its claims in bankruptcy grossly inflated would come at the expense of other creditors of bankrupt plan sponsors. Pursuant to the decisions of the lower courts in this case, based on the true economic value of the PBGC's claims, it will receive 4.6% of the remaining net distributable estate, with the other 95.4% going to the other Class 5B unsecured creditors based on the true economic value of their claims. If the PBGC had been successful in convincing the lower courts to allow its claims at 27 times their true value, it would have received 93.56% of the remaining net distributable estate while the other Class 5B unsecured creditors, restricted to the true ecomomic value of their claims, would have received only 6.44% of the remaining net distributable estate. This unequal treatment of creditors within the same class would run counter to the bankruptcy principle of equality and would violate Section 502(b) of the Bankruptcy Code, 11 U.S.C.A. § 502(b) (1999).

To the extent that the PBGC's predictions of doom for itself in view of the "slowdown in the U.S. economy" are anywhere near accurate, the outlook is just as bad, if not worse, for the other Class 5B unsecured creditors of Copperweld, most of whom are trade vendors to the steel industry. It is doubtful that any of those other creditors has accumulated a $9.7 billion surplus upon which to fall back. Perhaps those creditors are themselves sponsors of defined benefit pension plans insured by the PBGC. If the PBGC were successful in fulfilling its desire to further

build its surplus on their backs, that success could contribute to additional bankruptcies and additional pension plan terminations.

The PBGC also has complained that the decision of the court of appeals "requires a battle of experts in each case" and "provides no objective standard for courts to apply." Pet. 16. As noted previously, in this case, Ms. Belfance and the PBGC were able to agree that ten percent, net of all administrative expenses, represented a reasonably prudent investor rate of return. If the parties were unable to reach such an agreement in other cases, bankruptcy courts are well equipped to determine a reasonably prudent investor rate of return. It is a large part of a bankruptcy court's normal function to sit as a finder of fact on questions of valuation. *See, e.g., Associates Commercial Corp. v. Rash*, 520 U.S. 953, 965 (1997).

In this case, the PBGC argued for application of a discount rate of 6.4% for the first 20 years and 5.75% thereafter. The bankruptcy court applied a discount rate of 10%, which the parties stipulated was a rate to be expected by a reasonably prudent investor. The PBGC's actual rate of return on its equity investments for the year ending September 30, 2000, was 18.2% and, for the five-year period ending on that same date, was 19.9%. 2000 PBGC Ann. Rep. 17. There is no compelling reason for this Court to grant the PBGC's petition in this case.

II. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY DETERMINED THE DISCOUNT RATE TO BE USED IN ALLOWING THE PBGC'S UNFUNDED BENEFIT LIABILITIES CLAIMS

It is a normal function of a bankruptcy court to reduce amounts payable in the future to their present value. That function is specifically assigned to bankruptcy courts by Section 502(b) of the Bankruptcy Code, 11 U.S.C.A. § 502(b) (1999). Further, equality of distribution is the theme of bankruptcy. *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, *reh. denied*, 313 U.S. 600 (1941). In bankruptcy, creditors of the same class are to be treated equally.

As long ago noted by Justice Frankfurter, laws are designed to accomplish particular ends in specific situations:

> [L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends.

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columbia L. Rev. 527, 533 (1947). In bankruptcy, the theme of equality of distribution is advanced by accurately reducing future obligations to their present value. The regulation relied upon by the PBGC was adopted for attainment of a different end in a different situation. It not only does not advance bankruptcy's theme of equality, it runs counter to it. It exists for a completely different purpose – a purpose that is appropriate outside bankruptcy, but not in bankruptcy.

Congress created the PBGC for three specific purposes:

> (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
>
> (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which [ERISA] applies, and
>
> (3) to maintain premiums established by the [PBGC] . . . at the lowest level consistent with carrying out its obligations under [ERISA].

29 U.S.C.A. § 1302(a) (1999). The PBGC has described 29 C.F.R. § 2619 as a "carefully calibrated levy" that "acts as a counterweight to any incentive an employer may have to dump a pension plan on PBGC to rid itself of an unwanted financial burden." Pet. at 10. This "levy" is consistent with the first purpose assigned the PBGC by Congress for purposes of ERISA – to encourage continuation and maintenance of voluntary private pension plans. It furthers that purpose outside of bankruptcy. Within the context of bankruptcy, however, it does not further that purpose.

Much of the PBGC's petition is based upon speculation that plan sponsors will be lining up to file bankruptcy petitions as a result of the court of appeals decision in this case. According to the PBGC, "bargain-basement terminations" are available to employers because of the lower court's action, resulting in "perverse economic incentives." Pet. 14, 16. There is nothing in the record of this case, however, that indicates that Copperweld or CSC filed their petitions in bankruptcy in an

effort to get a "bargain-basement termination" of the pension plans at issue. In fact, neither the debtors nor individual decision-makers involved in filing their petitions for reorganization stand to gain anything as a result of the court of appeals decision in this case. As mentioned previously, a cash reserve was created to cover the maximum pro rata amount the PBGC could receive on its unfunded benefit liabilities claims. Neither the debtors nor individuals that were decision-makers of the debtors will share in that reserve. To the extent the money held in it is not distributed to the PBGC, it will be distributed to the other Class 5B unsecured creditors. The PBGC's fear that the court of appeals decision provides employers an opportunity to somehow profit though terminating their pension plans in bankruptcy finds no support in this case. Further, this case is no different from the vast majority of bankruptcy cases. Bankruptcy courts are about the business of dividing assets among creditors. The court of appeals decision in this case will not put any money in the debtors' pockets or in the pockets of the debtors' decision-makers. The PBGC's claimed "perverse economic incentives" are products of baseless speculation.

Bankruptcy courts calculate the present value of claims of creditors for the sole purpose of insuring that those creditors are treated equitably. Congress could not have intended for the PBGC to attempt to further its goal of discouraging pension plan terminations at the expense of other creditors in bankruptcy, particularly since increasing the PBGC's recovery at the expense of those other creditors would not advance that goal. Section 1301 of Title 29, one of the statutes relied upon by the PBGC as authority for 29 C.F.R. § 2619, specifically provides that

its definitions are only "[f]or purposes of this title" (Title IV of ERISA). Once an employer is in bankruptcy, the Bankruptcy Code rather than 29 C.F.R. § 2619 controls reduction of claims to their present value.

The PBGC, however, has argued that the bankruptcy court had no choice but to apply the interest factors contained in 29 C.F.R. § 2619 to calculate its unfunded benefit liabilities claims. According to it, it drafted that regulation pursuant to authority Congress delegated it in Sections 1301(a)(18) and 1362(b)(1)(A) of Title 19 of the United States Code, and the bankruptcy court had to defer to its selection of interest factors. It has suggested that it is the "master of the subject" and that Congress intended its policy determination to control over the bankruptcy requirement of equality. *See* Pet. at 17 (citing *United States v. Cleveland Indians Baseball Co.*, 121 S.Ct. 1433, 1444 (2001)).

There is no doubt that the PBGC is the "master of the subject" when it comes to the first step it follows in calculating unfunded benefit liabilities. Neither Ms. Belfance nor the lower courts have questioned the legitimacy of the assumptions used by the PBGC regarding such things as expected retirement ages or life expectancies. It is entirely proper for the PBGC to determine what future benefits will be due from the terminated plans. The PBGC, however, has no special expertise when it comes to reducing those future obligations to their present value. That is a function of the bankruptcy court, specifically

assigned to it by Section 502(b) of the Bankruptcy Code.[4] In fact, the PBGC does not claim that it has special expertise that allows it to more accurately reduce future benefits to their present value. Rather, it readily admits that it does not attempt to do that. It uses discount factors specifically chosen to value future obligations at more than their present value in an attempt to pursue its assigned purpose of discouraging early terminations of pension plans.

It is not unusual for the Bankruptcy Code to "reshape[ ] debtor and creditor rights in marked departure from [non-bankruptcy law]." *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997). For example, in *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996), this Court considered whether the fact that Congress had called a certain charge a "tax" as part of the Internal Revenue Code, meant that it was a "tax" for purposes of priority treatment in bankruptcy. It concluded that it did not. Rather than a bankruptcy court being required to mechanically accept the name placed on the charge by non-bankruptcy law, it was required to look behind that name and determine whether the true nature of the charge at issue was that of a tax. In that case, this Court determined that the charge at issue was not a tax. In this case, although the PBGC stipulated that its use of unreasonably low discount factors in calculating its unfunded benefit liabilities claims was for a purpose

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[4] As recognized by this Court in *Pension Benefit Guarantee Corporation v. LTV Corporation*, 496 U.S. 633, 646 (1990), the PBGC "can claim no expertise in the labor and bankruptcy areas."

other than arriving at the true value of its claims, it has argued that the bankruptcy court was not permitted to look past those calculations to arrive at the true value of those claims. Just as this Court held in *Reorganized CF & I Fabricators* that the bankruptcy court was required to look at the true nature of the charge at issue, in this case, the bankruptcy court correctly allowed the PBGC's claims based upon the true value of those claims rather than the artificially inflated value calculated by the PBGC.

Similarly, there has been a long line of cases that have rejected attempts by the Internal Revenue Service to impose interest rates used in the Internal Revenue Code upon debtors in bankruptcy. *See, e.g., United States v. Neal Pharmacal Co.*, 789 F.2d 1283 (8th Cir. 1986); *In re Southern States Motor Inns, Inc.*, 709 F.2d 647 (11th Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *In re Mansfield Tire & Rubber Co.*, 152 B.R. 477 (N.D. Ohio 1993); *In re Collins*, 184 B.R. 151 (Bankr. N.D. Fla. 1995); *In re Trevarrow Lanes, Inc.*, 183 B.R. 475 (Bankr. E.D. Mich. 1995). Although those interest rates are appropriate for purposes outside of bankruptcy, they are not appropriate for purposes of bankruptcy because they do not provide the Internal Revenue Service "the present value of its claim as required under 11 U.S.C. § 1129(a)(9)(C) (1982). . . . " *United States v. Neal Pharmacal Co.*, 789 F.2d 1283 (8th Cir. 1986).

The PBGC has suggested that the decision of the court of appeals in this case is inconsistent with this Court's decision in *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000). *Raleigh* dealt with the placement of the burden of proof on a state tax claim. There is nothing in the court of appeals decision in this case that is in any way inconsistent with this Court's opinion in *Raleigh*.

Refusal to follow the state law's placement of the burden of proof in *Raleigh* would have resulted in total disallowance of the claim at issue in that case. In this case, however, the PBGC's claims were allowed for their true value. Refusal to follow the regulation drafted by the PBGC for a purpose other than accurately valuing its unfunded benefit liabilities did not result in the complete disallowance of its claims.

Further, *Raleigh* did not involve a conflict between state law and bankruptcy law. There was no provision of the Bankruptcy Code that placed the burden of proof differently than it was placed by state law. As noted by this Court:

> Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code.

Raleigh, 530 U.S. at 20 (citations omitted). In this case, there is a "qualifying or contrary" provision of the Bankruptcy Code. Section 502(b) of the Bankruptcy Code, 11 U.S.C.A. § 502(b), specifically provides that, once there has been an objection to a claim, the bankruptcy court is to determine "the amount of such claim in lawful currency of the United States." To permit the PBGC, by its regulation, to dictate to the bankruptcy court the amount of its claim would be a violation of Section 502(b). It would also be a violation of the concept of equality embodied in Section 1123(a)(4) of the Bankruptcy Code, 11 U.S.C.A. § 1123(a)(4):

> (a) Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall –

. . . .

> (4) provide the same treatment for each claim or interest of a particular class. . . .

The PBGC has argued that the equality provision of Section 1123(a)(4) does not come into play until after a claim has "been determined and allowed by the bankruptcy court." Pet. 20. According to it, the bankruptcy court was required to allow its claims at the inflated amounts dictated by the PBGC's regulation, and then treat those inflated claims equally with other creditors' claims that had been allowed at their true values. The distinction argued for by the PBGC is a distinction without a difference. As discussed above, acceptance of the PBGC's argument would have meant that it would have recovered 93.56% of the remaining net distributable estate instead of the 4.6% of the remaining net distributable estate to which the true value of its claims entitle it. The process argued for by the PBGC is as violative of the principle of equality as would be a process that allowed the PBGC's claims in their true amount and then paid those claims at more than their face value while paying the claims of other creditors in the same class at less than their face value. The decision of the court of appeals in this case was consistent with bankruptcy law and consistent with this Court's decision in *Raleigh*. The United States Court of Appeals for the Sixth Circuit correctly determined the discount rate to be used in allowing the PBGC's unfunded benefit claims, and there is no compelling reason to grant certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH F. HUTCHINSON, JR.*
CLAIR E. DICKINSON
BROUSE MCDOWELL
Attorneys for Respondent
500 First National Tower
Akron, OH 44308
(330) 535-5711

**Counsel of Record*
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